

ORIGINAL

530 New

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Blan Jeffrey J.
 (Last) (First) (Initial)

Prisoner Number V-82054

Institutional Address "Old Folsom" State Prison, P.O. box 950
Folsom, California, 95763.

E-filing**FILED**

NOV 14 2007

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

JEFFREY JEROME BLAN

(Enter the full name of plaintiff in this action.)

vs.

M.C. Kramer, warden.

(Enter the full name of respondent(s) or jailor in this action)

CV 07**5781**

Case No. 5781
 (To be provided by the clerk of court)

PETITION FOR A WRIT
 OF HABEAS CORPUS
 AND EVIDENTIARY
 HEARING REQUEST

CRB**(PR)**

Read Comments Carefully Before Filing In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

007-5781CRB

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or
 3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which
 4 you are imprisoned or by whom you were convicted and sentenced. These are not proper
 5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief
 7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose
 8 custody you are now and the Attorney General of the state in which the judgment you seek to attack
 9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda -
 13 County Superior Court, Oakland):

14 Santa Cruz County Superior Court, Santa Cruz, Ca..

15 Court Location

16 (b) Case number, if known F09958

17 (c) Date and terms of sentence 6/1/05, Seven years.

18 (d) Are you now in custody serving this term? (Custody means being in jail, on
 19 parole or probation, etc.) Yes XXX No

20 Where? Folsom ,Ca.,

21 Name of Institution: "Old Folsom State Prison"

22 Address: P.O. box 950, Folsom, Ca., 95763

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for
 24 more than one crime, list each crime separately using Penal Code numbers if known. If you are
 25 challenging more than one sentence, you should file a different petition for each sentence.)

26 P.C. Sec. 459 and Sec. 667(a)(1)

27

28

3. Did you have any of the following?

Arraignment: Yes XXX No

Preliminary Hearing: Yes XXX No

Motion to Suppress: Yes XXX No

4. How did you plead?

Guilty Not Guilty XXX Nolo Contendere

Any other plea (specify) N/A

5. If you went to trial, what kind of trial did you have?

Jury XXX Judge alone Judge alone on a transcript

6. Did you testify at your trial? Yes No

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XXX No

(b) Preliminary hearing Yes XXX No

(c) Time of plea Yes XXX No

(d) Trial Yes XXX No

(e) Sentencing Yes XXX No

(f) Appeal Yes XXX No

(g) Other post-conviction proceeding Yes No XXX

8. Did you appeal your conviction? Yes XXX No

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XXX No

Year: 2006 Result: Denied (see attached)

Supreme Court of California Yes XXX No

Year: 2007 Result: Denied (see attached)

Any other court Yes XXX No

Year: 2005 Result: Motion to unseal denied
(see Attached)

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes XXX No

(c) Was there an opinion? Yes XXX No

(d) Did you seek permission to file a late appeal under Rule 31(a)?
Yes No XXX

If you did, give the name of the court and the result:

N/A

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes No XXX

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

a. N/A

b.

c.

d.

Result: N/A Date of Result: N/A

II. Name of Court: N/A

Type of Proceeding: N/A

Grounds raised (Be brief but specific):

1 a. N/A

2 b. _____

3 c. _____

4 d. _____

5 Result: N/A Date of Result: N/A

6 III. Name of Court: N/A

7 Type of Proceeding: N/A

8 Grounds raised (Be brief but specific):

9 a. N/A

10 b. _____

11 c. _____

12 d. _____

13 Result: N/A Date of Result: N/A

14 IV. Name of Court: N/A

15 Type of Proceeding: N/A

16 Grounds raised (Be brief but specific):

17 a. N/A

18 b. _____

19 c. _____

20 d. _____

21 Result: N/A Date of Result: N/A

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No XXX

24 Name and location of court: N/A

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
 27 support each claim. For example, what legal right or privilege were you denied? What happened?
 28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: Petitioner's conviction was obtained as the result
6 of ineffectiveness of counsel at trial. This violated petiti-
7 oner's right guaranteed by U.S.C.A. (5th, 6th & 14th Amend.)
Supporting Facts: _____

8 SEE ATTACHMENT BELOW
9 _____
10 _____

11 Claim Two: N/A
12 _____

13 Supporting Facts: N/A
14 _____
15 _____
16 _____

17 Claim Three: N/A
18 _____

19 Supporting Facts: N/A
20 _____
21 _____
22 _____

23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25 N/A
26 _____
27 _____
28 _____

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 Strickland v. Washington, 466 U.S. 668 (1984)

5 Chambers v. Mississippi, 410 U.S. 248 (1973)

6 Younger v. State of Ca., 12 Cal.3d 274 (1974)

7 Do you have an attorney for this petition? Yes _____ No XXX

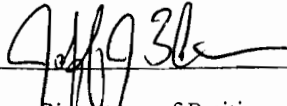
8 If you do, give the name and address of your attorney:

9 N/A

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on 10-30-07

14 Date

15 
16 Signature of Petitioner
17
18
19
20
21
22
23
24
25
26
27
28

(Rev. 6.02)

A T T A C H M E N T T O W R I T

JEFFREY JEROME BLAN

Case No, _____

vs.

M.C. KRAMER, warden

JEFFREY JEROME BLAN V-82054
"OLD FOLSOM" STATE PRISON,
P.O.BOX 950
FOLSOM , CALIFORNIA, 95763

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EXHIBIT 1

PROPOSED DECLARATION OF
CHRISTINA ALVAREZ

EXHIBIT 2 LETTER AND PROPOSED
DECLARATION SENT CHRISTINA
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CORRESPONDENCE SENT
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TABLE OF AUTHORITIES

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SECONDARY AUTHORITY

Justice Bernard S. Jefferson, Retired, <i>Jefferson's California Evidence Benchbook</i> (3 rd ed., December 1999)	24, 27
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PEOPLE OF THE STATE OF)	CASE NO.: _____
CALIFORNIA,)	
)	(SANTA CRUZ CO.
Plaintiff and Respondent,)	SUPERIOR COURT NO.
)	F09958; Related Appeal
)	Pending in No. H028989)
vs.)	
)	
JEFFREY JEROME BLAN)	
)	
Defendant and Petitioner)	
_____)	

PETITION FOR WRIT OF HABEAS CORPUS

**TO THE HONORABLE PRESIDING JUSTICE AND TO
THE HONORABLE ASSOCIATE JUSTICES OF THE COURT;**

Petitioner, Jeffrey Jerome Blan, by and through his attorney,
James W. Duffy, respectfully petitions this Court for a writ of habeas
corpus and by this verified petition sets forth the following facts and
causes for issuance of said writ:

///

I.

Petitioner Jeffrey Jerome Blan is presently unlawfully confined by the Director of Corrections at California State Prison, San Quentin in San Quentin, California. Petitioner is serving a sentence of seven years in state prison, which was unlawfully imposed by the Superior Court for Santa Cruz County in case number F09958 on Jun 1, 2005.

II.

This petition is being filed in this court pursuant to its original habeas corpus jurisdiction. (California Constitution, article VI, §10.)

III.

The present petition is being filed in conjunction with Petitioner's direct appeal in H028989. No other appellate proceedings exist with regard to the present confinement. No other petitions have been filed in any court with respect to this judgment.

IV.

In order to avoid unnecessary duplication, petitioner will rely in part on the record on appeal which has been filed in his attendant appeal. Hence, petitioner respectfully requests this court to take judicial notice of the transcripts, files, briefs, motions, and records in H028989. (Evid. Code, §§452, subd. (d)(1), 453, 459.)

V.

On April 12, 2006, petitioner was charged by the third criminal information filed in Santa Cruz County Superior Court. (CT 286-287.) The information charged him in Count 1 with entering an inhabited dwelling house and inhabited portion of a building with the intent to commit larceny in violation of Penal Code, section 459, 1st degree, felony, and in Count 2 with petty theft with a prior conviction for violation of Penal Code, section 666, for which he served a term of imprisonment, in violation of Penal Code, section 666, felony. (CT 286-287.) It was further alleged that: petitioner was previously convicted in the State of California of violation of Penal Code, section 666, for which he served a term of imprisonment as a condition of probation (CT 287); petitioner had suffered two strike priors within the meaning of Penal Code, section 667, subdivisions (b) – (i), one for burglary and one for robbery (CT 287-288); petitioner had suffered two prison priors within the meaning of Penal Code, section 667.5(b) (CT 288); petitioner has suffered two prior serious felony convictions within the meaning of Penal Code, section 667(a)(1) (CT 288-289); and petitioner was convicted of two felonies, burglary and robbery, within the meaning of Penal Code, section 1203(e)(4). (CT 289.)

VI.

The following is a summary of the factual background of the petitioner's matter:

On August 10, 2004, at about 1:00 am, Alan Yang went to the apartment of his friend, Emily Enns at 141 Chestnut Street, apartment no. 114. (RT 308, 334, 336.) As he approached the apartment he saw a pair of feet and legs coming out of her apartment window. (RT 337, 362.) When he got within approximately five feet of the suspect's location, he observed a male adult standing by the window (RT 363) and setting something down on the ground. (RT 338.) The suspect picked-up the window screen and attempted to affix it to the window. (RT 337, 353, 373.) Yang asked the suspect questions and engaged him in conversation. (RT 363, 364, 374.) The suspect told Yang that "he is playing a trick on his friends." (See Reporter's Transcript exhibit attached to Motion to Augment, ordered November 10, 2005 ("RTMA exhibit"), p. 8; see also Santa Cruz Police Department report, Case No. 04S-08697 ("Police Report"), a true and correct copy located in defense counsel's file is attached as exhibit B and incorporated by reference, p. 4 ["The black male told him something to the effect of, he was playing a trick on his friend"].) Yang asked

the suspect “Who lives here” and the suspect replied with the name of Eric. (RTMA exhibit, p. 8; see also defense counsel investigator report of Erin Haney (“Investigator’s Report”), dated October 28, 2004, a true and correct copy located in defense counsel’s file is attached as exhibit C and incorporated by reference, p. 2 [Yang could not recall if the suspect identified his friend as “Eric” or “Scott”]; see also exhibit D attached hereto and incorporated by reference, a true and correct copy of the declaration of the chief investigator for the Santa Cruz County Public Defender’s Office, verifying that Erin Haney worked for his office at the time of the report, but is no longer employed there.) Yang testified that he “remember[ed] Eric, because I knew there was an Eric at the complex, but not in that particular apartment. (RTMA exhibit, pp. 8-9.) And I told him Eric does not live here, what are you doing, and he kept trying to tell me he was playing a trick on his friends.” (RTMA exhibit, pp. 8-9; Investigator’s Report, exhibit C, p. 2 [Yang told the suspect, “No, your friends don’t live here”]; Chief Investigator’s Declaration, exhibit D.) Yang testified that he knew Erik lived in the complex because he was handicapped, and he had this big, red, Chevy truck. (RTMA exhibit,

p. 9; see also Investigator's Report, exhibit C, p. 2; Chief Investigator's Declaration, exhibit D.)

Yang called "911" and gave a description of the suspect. (RT 340.) Yang told the 911 dispatcher that the suspect is "talking to me right outside and I saw him climbing out the window." (A true and correct copy of the 911 taped transcript located in defense counsel's file ("911 taped transcript") is attached as exhibit A and incorporated by reference, p. 2.) Yang told the dispatcher that "I am outside, I am outside right now and I saw him climbing out the window." (Exhibit A, p. 2.) Yang observed the suspect put the object that he initially set down on the ground into his pocket. (RT 338.) Yang directed the suspect to "[d]rop what's in your pockets and leave." (RT 339.) The suspect began to walk away and Yang followed. (RT 342, 374.) The suspect turned around in the direction of Yang, walked past Yang and then jumped a fence. (RT 34, 343, 344, 367.) Yang followed the suspect from the other side of the fence, while keeping the suspect within his vision over the fence. (RT 344.) He lost sight of the suspect when the suspect jumped another fence (RT 345), although he could hear what he described as "change in a metal jar, or just change rattling." (RT 345.)

A Santa Cruz Police Officer responded to the incident (RT 526) and observed a suspect walk up a flight of stairs in an apartment complex and “kind of” crouch down between two apartment doors. (RT 528, 529.) The officer contacted the suspect and noted that he appeared slightly out of breath and had perspiration around his face, neck and shoulder areas. (RT 530-531.) The suspect told the officer that he was with “college kids” and that “they had told him to ‘mess with their papers.’” (See Police Report, exhibit B, p. 10.)

Yang was transported to the location of the suspect and identified the petitioner as the responsible party. (RT 309-310.) Petitioner was arrested and found to have loose change in his right pants pocket (RT 311), believed to be in amount was \$22.50 (RT 509): one fifty cent piece; 83 quarters; ten dimes; and five nickels. (RT 509.)

Emily Enns had been present in the apartment at the time of the offense (RT 385, 386, 387, 389), but did not hear anything unusual. (RT 390, 393.) Enns testified that she did not “know anyone in the apartment complex who would want to play a trick” on her. (ART 259.)

Enns testified that the apartment complex buildings “pretty much look the same,” having the same color, size and landscaping. (ART 262.) However, on redirect, Enns testified that her apartment building “looks a little bit different” from the other buildings. (Augmented Reporter’s Transcript (“ART”) 263.)

Enns’ roommate, Joanne Chou, indicated that she lived in the bedroom where entry had occurred (RT 398-402) and had left the apartment at about 11:00 p.m., leaving her bedroom door and window open. (RT 399.) She noted that a metal tin container that was in her room, containing about \$10.00 in change, mostly quarters (RT 401-404), was missing. (RT 407.)

The maintenance supervisor of the Chestnut Street Apartments (RT 540) testified that he recognized petitioner as having previously slept in one of the vacant units (RT 541), Building 153, apartment 139 (RT 546, 550), either during the month of July, 2004 (RT 544), or one or two weeks before August 13, 2004. (RT 551, 552.)

VII.

Petitioner was represented at trial by Christina Alvarez, Santa Cruz County Public Defender’s Office. People’s motion in limine, no. 7, moved the trial court to exclude any questions to Yang related

to petitioner's inquiry about an Eric because it is hearsay and not relevant. (RT 25; CT 271.) Trial counsel's performance fell below an objective standard of reasonableness because she did not file any opposition to the People's motion nor does the court record reflect that she posed any oral argument in opposition to the People's motion. The Court record does not reflect that she argued that the evidence was relevant because it went to petitioner's specific intent prior to entering the apartment. The Court record does not reflect that she argued that petitioner's statement to Yang was non-hearsay, or in the alternative, qualified as a hearsay exception.

XIII.

A jury actually heard petitioner's statement to Yang at his first jury trial. (RTMA exhibit, p. 8.) Trial counsel's closing argument manifested the defense theory of the case, which was that petitioner did not form the requisite specific intent to commit a burglary before he entered the apartment. (ART 357, 358, 359, 365, 366, 370.) This resulted in a hung jury. (CT 218.)

At petitioner's second trial, petitioner's statement to Yang was excluded and the defense theory suffered due to this. Under these circumstances, it is "reasonably probable" that the jury would have

acquitted petitioner of the burglary offense if it heard petitioner's statements to Yang. Indeed, the People modified its pleading theory for the second trial by alleging Count 2, petty theft with a prior. (CT 42, 286-287.)

IX.

On April 15, 2005, a jury convicted petitioner of 1st degree burglary and petty theft with a prior conviction, felonies. (RT 754.) The jury found the special allegations to be true pursuant to Penal Code section 667, subdivisions (a) and (b), Penal Code section 667, subdivision (b) through (i), and Penal Code section 1203, subdivision (b)(4). (RT 824-826.) The Court found the identity of the prior convictions to be true and that two prior convictions were for serious or violent felonies. (RT 827-828.)

On May 31, 2005, the district attorney moved to strike one of petitioner's prior strike convictions. (RT 1021.) On June 1, 2005, the Court sentenced petitioner to the mitigated term of two years and an additional five year term under Penal Code section 667, subdivision (a)(1), for a total of seven years. (RT 1254.) The Court stayed the punishment as to Count 2 pursuant to Penal Code section 654. (RT 1256.)

X.

In light of the foregoing, petitioner was deprived of the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. The incompetence of defense counsel was committed by the failure to file any opposition to the People's motion in limine, no. 7, to exclude petitioner's statement to witness Yang, or as the court record reflects, she made absolutely no oral argument in opposition that the evidence was admissible as non-hearsay, or in the alternative, as a hearsay exception.

Petitioner was prejudiced by trial counsel's failure to argue that this evidence was admissible. During petitioner's first trial, a jury actually heard the evidence of petitioner's statement to Yang (RTMA exhibit, p. 8), which returned a hung jury. (ART 357, 358, 359, 365, 366, 370; CT 218.) Significantly, the People modified its pleading theory for the second trial by alleging a second substantive offense of petty theft with a prior. (CT 42, 286-287.)

XI.

Petitioner has no plain, speedy, or adequate remedy at law, save this petition.

WHEREFORE, petitioner prays that this court: (1) issue an order consolidating this petition with the related pending appeal in H028989; (2) take judicial notice of the transcripts, files, briefs, motions, and records in H028989; (3) issue an order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's confinement; (4) issue an order for the taking of such evidence as may be necessary for the proper consideration of this petition; (5) issue the writ and reverse petitioner's conviction for burglary and vacate his sentence; and (6) grant petitioner whatever alternative or further relief as may be appropriate in the interests of justice.

Dated:

Respectfully Submitted,

Jeffrey Jerome Blan

VERIFICATION

I, James W. Duffy, declare and state as follows:

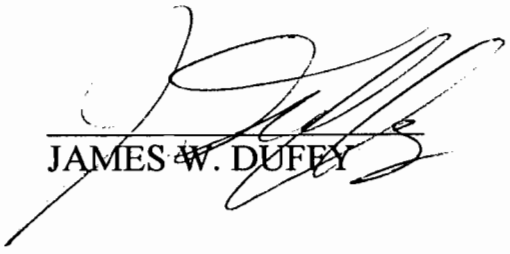
I am an attorney duly admitted and licensed to practice before all courts of this state; I have my professional office at 700 Frederick Street, Suite 306, Santa Cruz, California 95062.

I am counsel for petitioner in the foregoing petition and I am authorized to file this petition. I make this verification on petitioner's behalf since he is being confined outside of Santa Cruz County.

I have read the foregoing petition for Writ of Habeas Corpus, the Statement of Facts and Argument in support thereof, the record on appeal, and the exhibits attached to this petition. All facts alleged in the above petition for a writ of habeas corpus, not otherwise supported by citations to the record and the attached exhibits, are true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 2006, at Santa Cruz, California.


JAMES W. DUFFY

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On August 10, 2004, at about 1:00 am, Alan Yang went to the apartment of his friend, Emily Enns at 141 Chestnut Street, apartment no. 114. (RT 308, 334, 336.) As he approached the apartment he saw a pair of feet and legs coming out of her apartment window. (RT 337, 362.) When he got within approximately five feet of the suspect's location, he observed a male adult standing by the window (RT 363) and setting something down on the ground. (RT 338.) The suspect picked-up the window screen and attempted to affix it to the window. (RT 337, 353, 373.) Yang asked the suspect questions and engaged him in conversation. (RT 363, 364, 374.) The suspect told Yang that "he is playing a trick on his friends." (Reporter's Transcript exhibit attached to Motion to Augment ("RTMA exhibit"), p. 8; see also Santa Cruz Police Department report, Case No. 04S-08697 ("Police Report"), a true and correct copy that was located in defense counsel's file is attached as exhibit B and incorporated by reference, p. 4 ["The black male told him something to the effect of, he was playing a trick on his friend"].) Yang asked the suspect "Who lives here" and the suspect replied with the name of Eric. (RTMA exhibit, p. 8; see also

defense counsel's investigator's report ("Investigator's Report"), dated October 28, 2004, a true and correct copy of which is attached as exhibit C and incorporated by reference, p. 2 [Yang could not recall if the suspect identified his friend as "Eric" or "Scott"]; see also the Chief Investigator's Declaration, a true and correct copy of which is attached as exhibit D and incorporated by reference.) Yang testified that he "remember[ed] Eric, because I knew there was an Eric at the complex, but not in that particular apartment. And I told him Eric does not live here, what are you doing, and he kept trying to tell me he was playing a trick on his friends." (RTMA exhibit, pp. 8-9; Investigator's Report, exhibit C, p. 2 [Yang told the suspect, "No, your friends don't live here"]; Chief Investigator's Declaration, exhibit D.) Yang testified that he knew Erik lived in the complex because he was handicapped, and he had this big, red, Chevy truck. (RTMA exhibit, p. 9; see also Investigator's Report, exhibit C, p. 2; Chief Investigator's Declaration, exhibit D.)

Yang called "911" and gave a description of the suspect. (RT 340.) Yang told the 911 dispatcher that the suspect is "talking to me right outside and I saw him climbing out the window." (A true and correct copy of the 911 taped transcript located in defense counsel's

file (“911 taped transcript”) is attached as exhibit A and incorporated by reference, p. 2.) Yang told the dispatcher that “I am outside, I am outside right now and I saw him climbing out the window.” (See 911 taped transcript, exhibit A, p. 2.) Yang observed the suspect put the object that he initially set down on the ground into his pocket. (RT 338.) Yang directed the suspect to “[d]rop what’s in your pockets and leave.” (RT 339.) The suspect began to walk away and Yang followed. (RT 342, 374.) The suspect turned around in the direction of Yang, walked past Yang and then jumped a fence. (RT 34, 343, 344, 367.) Yang followed the suspect from the other side of the fence, while keeping the suspect within his vision over the fence. (RT 344.) He lost sight of the suspect when the suspect jumped another fence (RT 345), although he could hear what he described as “change in a metal jar, or just change rattling.” (RT 345.)

A Santa Cruz Police Officer responded to the incident (RT 526) and observed a suspect walk up a flight of stairs in an apartment complex and “kind of” crouch down between two apartment doors. (RT 528, 529.) The officer contacted the suspect and noted that he appeared slightly out of breath and had perspiration around his face, neck and shoulder areas. (RT 530-531.) The suspect told the officer

that he was with “college kids” and that “they had told him to ‘mess with their papers.’” (See Police Report, exhibit B, p. 10.)

Yang was transported to the location of the suspect and identified petitioner as the responsible party. (RT 309-310.)

Petitioner was arrested and found to have loose change in his right pants pocket (RT 311), believed to be in amount was \$22.50 (RT 509): one fifty cent piece; 83 quarters; ten dimes; and five nickels. (RT 509.)

Emily Enns had been present in the apartment at the time of the offense (RT 385, 386, 387, 389), but did not hear anything unusual. (RT 390, 393.) Enns testified that she did not “know anyone in the apartment complex who would want to play a trick” on her. (ART 259.)

Ms. Enns testified that the apartment complex buildings “pretty much look the same,” having the same color, size and landscaping. (ART 262.) On redirect, Enns testified that her apartment building “looks a little bit different” from the other buildings. (ART 263.)

Enns’ roommate, Joanne Chou, indicated that she lived in the bedroom where entry had occurred (RT 398-402) and had left the apartment at about 11:00 p.m., leaving her bedroom door and window

open. (RT 399.) She noted that a metal tin container that was in her room, containing about \$10.00 in change, mostly quarters (RT 401-404), was missing. (RT 407.)

The maintenance supervisor of the Chestnut Street Apartments (RT 540) testified that he recognized petitioner as having previously slept in one of the vacant units (RT 541), Building 153, apartment 139 (RT 546, 550), either during the month of July, 2004 (RT 544), or one or two weeks before August 13, 2004. (RT 551, 552.)

ARGUMENT

The record establishes that trial counsel Alvarez did not file any opposition to People's motion to exclude petitioner's statement to witness Alan Yang nor did she make an oral argument in opposition. According to trial counsel, she believed petitioner's statement was hearsay and inadmissible. (See Declaration of James W. Duffy, a true copy of which is attached hereto as exhibit E and incorporated by reference, Paragraph 5.) However, she later advised that the subject People's Motion was discussed in the judge's chambers. (See exhibit E, Paragraph 10.) On March 2, 2006, petitioner's counsel sent trial counsel correspondence memorializing the previous conversations and requested that she communicate with petitioner's counsel to draft an

accurate declaration for her signature. (See exhibit E, Paragraph 11; see March 2, 2006 letter attached thereto as exhibit 3 and incorporated by reference.) She did not respond to this correspondence. (See exhibit E, Paragraph 11.)

Petitioner contends that filing an opposition memorandum of points and authorities to the Peoples' Motion in limine, no. 7, would have been meritorious, and there was no reasonable tactical reason to refrain from making such argument. The conclusion is unavoidable that petitioner was deprived of the effective assistance of counsel to the extent that the prosecution would have been unable to convict petitioner of burglary had trial counsel argued that petitioner's statement to witness Yang was admissible evidence. Petitioner now establishes this conclusion.

I.

THE FILING OF THIS PETITION ALONG WITH A REQUEST THAT IT BE CONSOLIDATED WITH PETITIONER'S PENDING DIRECT APPEAL IS THE APPROPRIATE PROCEDURE.

Petitioner is filing this petition in the first instance in this court because his direct appeal, H028989, is pending before this Court. In employing this procedure, petitioner has sought to comply with the principles enunciated by the California Supreme Court. Thus, in

People v. Pope (1979) 23 Cal.3d 412, the Court discussed the appropriate legal mechanism for raising the issue of ineffective assistance of counsel. In relevant part, the court held that judicial economy is best served if a petition for habeas corpus is joined with the direct appeal. (*Id.*, at pp. 426-427, fn. 17; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In light of the guidelines set forth in *Pope*, petitioner respectfully requests this court to exercise its original habeas corpus jurisdiction pursuant to Article VI, section 10 of the California Constitution. In this way, judicial economy will be served by the simultaneous resolution of both this petition and the related appeal. (*People v. Pope, supra*, 23 Cal.3d at pp. 426-427, fn. 17.)

II.

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ARGUE IN OPPOSITION TO THE PEOPLE'S MOTION TO EXCLUDE PETITIONER'S STATEMENT TO WITNESS YANG.

Criminal defendants have the right to the assistance of counsel under both the Sixth Amendment and Fourteenth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This

entitles him not to some bare assistance but rather to effective assistance. (e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Defense counsel's performance was deficient if it fell below an objective standard of reasonableness, and if a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable.

In *In re Marquez* (1992) 1 Cal.4th 584, 602-603, the California Supreme Court, quoting *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694, stated as follows:

There are two components to a claim by a defendant that his counsel's assistance was so defective as to require reversal of a conviction or death sentence. [Citations.] 'First, the defendant must show that counsel's performance was deficient, representation fell below an objective standard of reasonableness.' [Citations.] In evaluating a defendant's showing of incompetence, we accord great deference to the tactical decision of trial counsel. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' [Citations.]

The second component requires that the defendant show prejudice resulting from counsel's alleged deficiencies. 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ (Accord, *People v. Hart* (1999) 20 Cal.4th 546, 624.)

The California Supreme Court stated in *People v. Ledesma*, *supra*, 43 Cal.3d 171, that it is the defendant’s burden to establish that: (1) his trial counsel’s performance was below the objective standard of prevailing professional norms; and (2) he was prejudiced by counsel’s failings. (*Id.*, at pp. 216-217.) An essential skill of a trial lawyer is the requisite skills and knowledge of the hearsay rules of evidence and their exceptions. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688 [“Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process”].)

A. Trial Counsel’s Performance Fell Below An Objective Standard Of Reasonableness When She Failed To Offer Petitioner’s Statement To Yang As Non-Hearsay.

People’s motion in limine, no. 7, moved the Court to exclude any questions to witness Alan Yang related to petitioner’s inquiry about Eric on the grounds that it is inadmissible hearsay and not relevant. (RT 25; CT 271.) Trial counsel’s performance fell below an objective standard of reasonableness because she did not file any

opposition to the People's motion nor does the court record reflect that trial counsel posed any oral argument in opposition. The Court tentatively ruled that it would sustain the objection if the People timely objected because it is a "self-serving statement" "offered to prove the truth of the matter asserted." (RT 25-26.) The Court directed defense counsel not to ask Yang any questions related to Erik, subject to further arguments. (RT 26; CT 27.)

1. Petitioner's statement was a non-hearsay statement not offered for the truth of the matter asserted.

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, §1200, subd. (a).) If the statement is offered for a purpose other than to assert the truth of the matter, then it is not hearsay. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 714.)

People's in limine motion, no. 7, moved the Court to exclude petitioner's statement to witness Yang because it is hearsay and not relevant. (CT 271.) Yang testified at petitioner's first trial that when he confronted petitioner outside the apartment window, petitioner told him that "he is playing a trick on his friends" (RTMA exhibit, p. 8)

and petitioner told him that Eric lived in that apartment. (RTMA, exhibit p. 8.) Petitioner's statement to Yang is not hearsay because it is not offered to prove the truth of the facts asserted, namely that petitioner was actually playing a trick on Eric, who he believed lived in that apartment. (RTMA exhibit, p. 8.) It was relevant because it went to an element of the offense, to wit: petitioner's specific intent prior to entering the residence.

2. Petitioner's statement was a non-hearsay statement related to his state of mind.

A declarant's statement that is not a direct assertion of his then-existing state of mind, emotion, or physical sensation is not hearsay if the statement asserts other facts and is offered as circumstantial evidence of the declarant's state of mind. In this latter situation, principles of relevancy and circumstantial evidence arise, not the hearsay rule. (*People v. Sanders* (1995) 11 Cal.4th 475, 517; *People v. Arguello* (1967) 65 Cal.2d 768, 773; *Jefferson's Evidence* §14.11, pp. 211-212.)

Petitioner's statement to Yang that he was playing a trick on Eric, who he believed lived in that apartment, occurred when petitioner was found coming out of the victims' apartment and attaching the screen to the window. (RT 337, 362; RTMA exhibit, p.

8; 911 Taped Transcript, exhibit A, pp. 1, 2; Police Report, exhibit B, p. 4; Investigator's Report, exhibit C, pp. 1, 2; Chief Investigator's Declaration, exhibit D.) Petitioner's statement is not hearsay because it was not a direct assertion of his state of mind, but rather an assertion of other circumstantial facts about his state of mind, namely that he thought he was playing a trick on Erik, who he believed lived in that apartment. (RTMA exhibit, p. 8; Police Report, exhibit B, p. 4; Investigator's Report, exhibit C, pp. 1, 2; Chief Investigator's Declaration, exhibit D.) It is probative because it goes to petitioner's specific intent prior to entering the apartment.

B. Trial Counsel's Performance Fell Below An Objective Standard Of Reasonableness When She Failed To Offer Petitioner's Statement To Yang As Non-Hearsay.

1. Petitioner's statement qualified as a contemporaneous statement hearsay exception.

To qualify as a contemporaneous statement hearsay exception, the statement must be:

- (a) "offered to explain, qualify, or make understandable conduct of the declarant; and

(b) was made while the declarant was engaged in such conduct.” (Evid. Code, §1241; *People v. Marchialette* (1975) 45 Cal.App.3d 974, 979-981.)

Yang’s testimony qualified as a contemporaneous statement hearsay exception because it was offered to explain and make understandable why petitioner was exiting the apartment window. (RT 337, 362, 363; Police Report, exhibit B, p. 4; Investigator’s Report, exhibit C, pp. 1, 2; Chief Investigator’s Declaration, exhibit D.) Further, the statement was made while petitioner was “engaged in such activity” of having just exited the apartment window and replacing the screen. (RTMA exhibit, p. 8; Police Report, exhibit B, p. 4; Investigator’s Report, exhibit C, pp. 1, 2; Chief Investigator’s Declaration, exhibit D.) (See Evid. Code, §1241; *People v. Marchialette, supra*, 45 Cal.App.3d at pp. 979-981.)

2. Blan’s statement qualified as a state of mind hearsay exception.

An out of court statement qualifies as a hearsay exception if it expresses the declarant’s then-existing state of mind, emotion, or physical sensation.” (Evid. Code, §1250, subd. (a).) To qualify,

- “(1) [t]he evidence must be offered “to prove the declarant’s state of mind, emotion, or physical sensation at that time or at any time when it is itself an issue in the action; or
- (2) The evidence is offered to prove or explain acts or conduct of the declarant.” (Ibid.)

If the declarant’s state of mind, emotion, or physical sensation at the time the declarant makes a statement is an issue in a case, then a statement directly asserting his then-existing state of mind, emotion, or physical sensation is relevant. (*People v. Taylor* (1980) 112 Cal.App.3d 348, 364; see also *Jefferson’s Evidence* §14.6, at p. 210..) However, the state of mind hearsay exception must be excluded if it is made under circumstances indicating lack of trustworthiness; if there was present a strong motive for the declarant to misrepresent or manufacture evidence; or is unreliable because of a strong showing of its self-serving nature. (Evid. Code, §1252; *People v. Edwards* (1991) 54 Cal.3d 787; *People v. Pearch* (1991) 229 Cal.App.3d 1282; *Jefferson’s Evidence* §14.8 at p. 210.)

Petitioner’s statement to Yang qualifies as a state of mind hearsay exception because it could have been offered to prove petitioner’s state of mind at the time his state of mind was at issue,

namely his specific intent prior to entering the apartment. Yang would have testified that when he confronted petitioner, he told Yang that he was playing a trick on Eric, who he believed lived in that apartment. (RTMA exhibit, p. 8; Police Report, exhibit B, p. 4; Investigator's Report, exhibit C, pp. 1, 2; Chief Investigator's Declaration, exhibit D.) Petitioner's statement to Yang would also have been offered as evidence to prove and explain his actions and conduct of why he entered the apartment.

This evidence was trustworthy because Yang and a Patricia Ross, apartment manager (RT 27; CT 277), could have testified that an Eric did indeed live in the victims' apartment complex at one time. (RT 28; CT 283; RTMA exhibit, pp. 8, 9; Investigator's Report, exhibit C, p. 2 ["Alan [Yang] commented that there is a resident named Eric and another one named Scott that live in the apartment complex"]; Chief Investigator's Declaration, exhibit D.) It is expected that Ross would have testified that Eric lived in "unit that's exactly like the unit ... [as the victims' apartment] and was "directly behind that which ... [the victims] lived," "a corner unit." (RT 28.) It is understandable that petitioner was mistaken regarding the apartment building that Eric lived because all the apartment buildings "pretty

much looks the same.” (ART 262.) Although Yang indicated to the investigator that “...he did not believe that the suspect man thought it was Eric or Scott’s apartment” (Investigator’s Report, exhibit C, p. 2; Chief Investigator’s Declaration, exhibit D), his testimony indicated that petitioner’s statement did not appear to have been quickly manufactured because petitioner appeared to Yang to have a low intellectual functioning ability. Yang specifically testified that petitioner “did not answer questions sharply and quickly” and agreed with a characterization that petitioner was not “the brightest cookie.” (RTMA exhibit, p. 37.) Petitioner’s statement qualified as a state of mind hearsay exception and should have been admitted at his second trial. (*People v. Minifie* (1996) 13 Cal.4th 1055.)

C. Defense Counsel’s Failure To Offer Petitioner’s Statement To Yang As Non-Hearsay, Or In The Alternative As A Hearsay Exception, Was Not A Reasonable Tactical Decision.

Petitioner’s trial counsel, Christina Alvarez, was contacted to explain why she did not pose any opposition to People’s in limine motion, no. 7. On October 3, 2005, Ms. Alvarez advised that she thought she did in fact argue that this evidence was admissible, but could not recall. However, she did not believe that the contemporaneous statement hearsay exception was applicable because

she thought petitioner's statement to Yang was hearsay and considered untrustworthy. (See Declaration attached hereto as exhibit D, and incorporated by reference, Paragraph 5.) On October 19, 2005, Ms. Alvarez expressed a willingness to execute a declaration that relates to her not arguing that petitioner's statement to Yang be admitted as a contemporaneous statement exception to the hearsay rule. (See exhibit E, Paragraph 6.) On January 30, 2006, a proposed declaration was sent Ms. Alvarez, requesting that she execute it if accurate. (See exhibit E, Paragraph 7, and the January 30, 2006 correspondence and proposed declaration sent to Ms. Alvarez attached thereto as exhibit 1 and incorporated by reference.) Ms. Alvarez did not respond. A second letter and declaration were sent Ms. Alvarez on February 24, 2006. (See exhibit E, Paragraph 8, and February 24, 2006 correspondence and proposed declaration attached thereto as exhibit 2 and incorporated by reference.) On February 28, 2006, Ms. Alvarez advised that the declaration sent her was inaccurate and that she had previously advised that People's Motion in Limine No. 7 was discussed in judge's chambers. (See exhibit E, Paragraph 10.) Ms. Alvarez expressed an unwillingness to communicate further regarding this subject and was unwilling to execute any declaration. (See

exhibit E, Paragraph 10.) On March 2, 2006, correspondence was sent to Ms. Alvarez that reiterated the contents of the foregoing communications and requested that she make any corrections to her proposed declaration that she desired. (See exhibit E, Paragraph 11, and exhibit 3 attached thereto.) Ms. Alvarez did not respond. (See exhibit E, Paragraph 11.)

There can be no tactical reason for counsel's omissions. Indeed, petitioner's statements formed the defense theory of the case, which was that petitioner lacked the larcenous specific intent prior to entering the residence. (ART 357, 358, 359, 365, 366, 370.)

D. Petitioner Was Prejudiced By Trial Counsel's Ineffective Assistance.

As stated above, it is not sufficient merely to show that trial counsel erred; it must also be shown that "...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.)

Petitioner was prejudiced by trial counsel's ineffective assistance because it is reasonably probable that a more favorable result would have occurred, but for defense counsel's error. Indeed, petitioner's first trial admitted this evidence and the trial ended with a

hung jury. (CT 218.) This defense theory significantly suffered without the admission of petitioner's statements to Yang (RT 589, 590, 591, 592), and the second trial resulted in petitioner's conviction. (RT 754.)

CONCLUSION:

For the reasons expressed above, petitioner respectfully requests that this court grant his writ and reverse the burglary judgment.

PROOF OF SERVICE BY MAIL

I, TONY GOODRUM, AM A RESIDENT OF FOLSOM STATE PRISON IN THE COUNTY OF SACRAMENTO, STATE OF CALIFORNIA. I AM OVER THE AGE OF 18 YEARS, AND I ~~AM~~/AM NOT A PARTY TO THIS ACTION.

MY PRISON NUMBER IS: T-86808

MY PRISON ADDRESS IS: P.O. BOX 950, Folsom, Ca. 95763

ON or about 10/30/07, 2007, I SERVED A COPY OF THE FOLLOWING DOCUMENTS

Writ of Habeas Corpus
Informa Pauperis

ON THE FOLLOWING PARTIES BY PLACING THE DOCUMENTS IN A SEALED ENVELOPE WITH POSTAGE FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT FOLSOM STATE PRISON (MAILBOX RULE), FOLSOM, CALIFORNIA, ADDRESSED AS FOLLOWS:

United States District Court
Northern District of California

450 GOLDEN GATE AVE.

SAN FRANCISCO, CA, 94102-3483

THERE IS DELIVERY SERVICE BY THE UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND/OR THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED.

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED October 30th,, 2007, AT FOLSOM, CALIFORNIA..



<signature here>